RHB FINANCE BHD

v.

CN CORPORATE NETWORK (M) SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[CIVIL SUIT NO: S2-22-140-1998]
24 JANUARY 2000

CIVIL PROCEDURE: *Default judgment - Setting aside - Failure of counsel to give opposing counsel notice of intention to enter judgment by default - Whether judgment ought to be set aside - Whether may be set aside even though no rule under Rules of the High Court 1980 breached - Legal Profession (Practice and Etiquette) Rules 1978, r. 56 - Rules of the High Court 1980, O. 92 r. 4*

LEGAL PROFESSION: *Practice and etiquette - Notice of intention to enter judgment by default - Whether oral notice given to opposing counsel sufficient - Whether failure to give written notice renders judgment liable to be set aside - Legal Profession (Practice and Etiquette) Rules 1978, r. 56*

The sole issue in the instant appeal turned on whether the failure to comply with r. 56 of the Legal Profession (Practice and Etiquette) Rules 1978 ('the Rules') renders a judgment obtained in default liable to be set aside. The said rule provides, *inter alia*, that judgment in default may not be entered by an advocate and solicitor without giving written notice of his intention to do so to the opposing advocate and solicitor. Plaintiff's counsel contended that he had given oral notice of his intention to enter judgment in default to the defendants' counsel.

Held:

[1] Although s. 77(3) of the Legal Profession Act 1976 provides for the possibility of disciplinary proceedings against the advocate and solicitor breaching a rule, any breach of any rule ought to be considered by the court for its relevancy. The purpose of r. 56 of the Rules surely cannot be that if a solicitor deliberately flouts it by failing to give the notice, all he can be liable for is a possible disciplinary proceeding against him. The true purport and effect of introducing this rule is to show to practising lawyers that they cannot take in default judgment unless they comply with the provisions of the rule. Therefore, any

breach of r. 56 of the Rules must of necessity entitle the defendant, if he can successfully show the breach, to set aside the judgment obtained in default.

[2] Even assuming that counsel for the plaintiff had given oral notice, that is insufficient since r. 56 of the Rules requires written notice to be given. Once an advocate and solicitor has been shown to have breached r. 56 of the Rules, notwithstanding the fact that he has not breached any rules of the Rules of the High Court 1980, the court is always empowered under its inherent powers to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

[Plaintiff's appeal dismissed; no order as to costs.]

Case(s) referred to:
Asia Commercial Finance (M) Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1988] 1 MLJ 33 ***(not foll)***

Legislation referred to:
Legal Profession Act 1976, s. 77(3)
Legal Profession (Practice and Etiquette) Rules 1978, r. 56
Rules of the High Court 1980, O. 2 r. 1, O. 92 r. 4

For the appellant - MJ Yap; M/s Chung, Huang & Khalid
For the 1st, 2nd, & 3rd defendants - Kushuwant Singh; M/s Norendra & Yap

Reported by S Dharmendran

JUDGMENT

RK Nathan J:

Facts

The plaintiff sued six defendants. It is not necessary to go into the causes of action for the purpose of this application. This matter relates to only the 1st, 2nd and 3rd defendants. The writ of summons and statement of claim were served on the 1st defendant on 27 March 1998, on the 2nd defendant on 3 April 1998 and on the 3rd defendant on 1 April 1998. All three defendants (the defendants) were represented by solicitors who entered appearance for them on 9 April 1998. The affidavit of service in respect of the defendants was filed on 13 May 1998 but it is to be noted that there is no date to show when it was in fact affirmed. On 27 November 1998 the solicitors for the defendants obtained a discharge but the said fair order was only filed on 4 January 1999. The case was fixed for case management

on 5 January 1999 when both counsel appeared. Mr. Guna appearing for the defendants, confirmed that he was still on record as the fair order had not as yet been extracted from the registry. The court then fixed 3 February 1999 for case management. In the meantime, this court had sent out a notice to both solicitors on 26 January 1999 informing them that the case management fixed for 3 February 1999 had been postponed to 22 February 1999 as I was on leave. This court then by a letter dated 11 February 1999 informed the plaintiff's solicitors and the defendants to attend on 22 February 1999. However the plaintiff had obtained judgment in default of defence on 4 February 1999. The defendants applied to set aside the default judgment. The learned senior assistant registrar allowed the application and gave the defendants 14 days to file the defence. This is the plaintiff's appeal against that decision.

Findings Of The Court

If the court had proceeded with the case management on 3 February 1999, certainly the plaintiff would not have been able to obtain judgment in default of defence since the defendants' counsel would have been present or at least the defendants would have been present. Since there is no evidence before me as to when the fair order in respect of the discharge of the defendants' former solicitors was extracted and served on the plaintiff's solicitors and since as at 5 January 1999 when both counsel appeared before me, the fair order in respect of the discharge had not been extracted, I was of the view that as the defendants' solicitors were still on record it was the duty of the plaintiff's solicitors to have given the usual statutory notice pursuant to r. 56 of the Legal Profession (Practice and Etiquette) Rules 1978. The said rule reads as follows:

> 56. Judgment by default
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> Where the name of the advocate and solicitor or his firm appears on the Court record or the fact of representation is known to the other side, no advocate and solicitor representing the other party to the proceedings shall enter Judgment by Default against the client of the first-named advocate and solicitor or to take advantage of delay in pleading or filing documents in the nature of pleadings or in taking any necessary steps or in complying with any other proceedings by such first-name advocate and solicitor, unless he shall have given to such first-named advocate and solicitor written notice of his intention to do so, and seven days shall have elapsed after the delivery of such notice to the first-named advocate and solicitor.

These rules are made pursuant to s. 77 of the Legal Profession Act 1976. The said section reads as follows:

77. Power to make rules regulating practice, etc.

(1) Without prejudice to any other power to make rules provided under this Act, the Bar Council may, with the approval of the Attorney General make rules for regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors.

(2) Any rules made pursuant to this section shall not come into operation until they have been published in the Gazette.

(3) Any advocate and solicitor who fails to comply with any rules made under this section may be liable to disciplinary proceedings.

(4) The Attorney General may, by order published in the Gazette, make such modifications as he deems necessary to any rules made and published under this section before the coming into operation of this subsection.

Whilst sub-s. (3) of s. 77 provides for the possibility of disciplinary proceedings against the advocate and solicitor breaching a rule I am of the view that any breach of any rule ought to be considered by the court for its relevancy. What is the purpose of r. 56. Surely it does not mean that if a solicitor deliberately flouts it by failing to give the notice all he can be liable for is a possible disciplinary proceeding against him. I am of the view that the true purport and effect of introducing this rule is to show to practising lawyers that they cannot take in default judgment unless they comply with the provisions of the rule. Any breach of r. 56 therefore must of necessity entitle the defendant, if he can successfully show the breach, to set aside the judgment obtained in default.

When I asked counsel for the plaintiff if he had given the statutory notice he frankly admitted that he had only given oral notice. Even assuming that he did give oral notice, that is insufficient. The rule requires a written notice to be given.

I am aware of the decision in *Asia Commercial Finance (M) Bhd v. Bank Bumiputra Malaysia Berhad & Ors* [1988] 1 MLJ 33, where the court held that non-compliance with r. 56 does not render the judgment in default of defence irregular. The learned judge went on to hold that under O. 2 r. 1 of the Rules of the High Court (the RHC), only failure to comply with the RHC should be treated as an irregularity. It is my judgment that once an advocate and solicitor has been shown to have breached r. 56 then notwithstanding the fact that he has not breached any of the rules of the RHC, the court is always empowered under its inherent powers to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court (see O. 92 r. 4 of the RHC). Since the

plaintiff's solicitors have confirmed that no notice pursuant to r. 56 has been given to the defendants, I dismissed the appeal. In the exercise of my discretion, I felt that this was not a proper case to grant the successful defendants their costs. There was therefore no order for costs.